

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

Maria Del Socorro Quintero Perez, CY, a  
Minor, and BY, a Minor,

Plaintiffs,

v.

UNITED STATES OF AMERICA,  
UNITED STATES DEPARTMENT OF  
HOMELAND SECURITY, UNITED  
STATES CUSTOMS AND BORDER  
PROTECTION OFFICE OF BORDER  
PATROL, JANET NAPOLITANO,  
THOMAS S. WINKOWSKI, DAVID  
AGUILAR, ALAN BERSIN, KEVIN K.  
McALLEENAN, MICHAEL J. FISHER,  
PAUL A. BEESON, RICHARD  
BARLOW, RODNEY S. SCOTT, CHAD  
MICHAEL NELSON, AND DORIAN  
DIAZ, AND DOES 1 - 50.,

Defendants.

Case No.: 13cv1417-WQH-BGS

**ORDER GRANTING PLAINTIFFS'  
SECOND MOTION TO COMPEL**

**I. BACKGROUND**

On December 7, 2015 and December 8, 2015, counsel for Plaintiffs, Mr. McBride, and counsel for Defendants, Ms. Schweiner, jointly called the Court regarding a

1 discovery dispute in compliance with the Court's Chambers' Rules. (ECF No. 110 at 1-  
 2.) During both calls, Plaintiffs sought permission to file a motion to compel regarding  
 3 two documents identified in Defendants' privilege log they believed were improperly  
 4 withheld on the basis of the official information and deliberative process privileges.  
 5 (ECF No. 110 at 3.) The two documents at issue are (1) U.S. Customs and Border  
 6 Protection Use of Force Review Report ("Use of Force Review Report") (bates numbers  
 7 Deft-1164-1183) and (2) Recommendations of the CBP Use of Force Incident Review  
 8 Committee, Recommendations of the Police Executive Research Forum  
 9 (PERF) ("Recommendations Report") (Deft 1184-1226).

10 The Court granted the parties permission to brief the issue of privilege and ordered  
 11 Defendants to lodge their privilege log and disputed documents for *in camera* review.  
 12 (*Id.* at 3-4) Plaintiffs filed a Second Motion to Compel Production of Purportedly  
 13 Privileged Documents on December 18, 2015 (ECF No. 113), and Defendants filed their  
 14 opposition on December 24, 2015. (ECF No. 117.) Plaintiffs replied on December 28,  
 15 2015. (ECF No. 120.)

## 16 **PARTIES' ARGUMENTS**

17 Plaintiffs argue that Defendants have not validly asserted the official information  
 18 privilege<sup>1</sup> or the deliberative process privilege in response to Plaintiffs' RFPs, and  
 19 therefore, the Court should deem the privileges waived without an *in camera* review.  
 20 (ECF No. 113 at 4.) Specifically, Plaintiffs argue that Defendants did not timely submit a  
 21 declaration from a responsible official within their agency, as required under *Hampton*.  
 22 (ECF No. 113 at 3.) Plaintiffs also state that because the documents at issue are not  
 23 predecisional and deliberative, they are not subject to the protection of the deliberative  
 24 process privilege. (*Id.* at 5.) Moreover, Plaintiffs assert that their "interests as civil-rights  
 25 litigants outweigh any governmental interest in maintaining the secrecy of any

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27 <sup>1</sup> Plaintiffs' brief analyzes the official information privilege. The Court notes, however, that  
 28 Defendants' privilege log does not claim either document is protected by the official information  
 privilege. (*See* ECF No. 114-3 at 9.)

1 deliberative process.” (*Id.*)

2 Defendants argue that the documents at issue are protected from disclosure by the  
 3 deliberative process privilege. (ECF No. 117 at 3.) In support of this assertion,  
 4 Defendants submit the declaration from Christopher J. Hall, the Assistant Commissioner,  
 5 Office of Training and Development, United States Customs and Border Protection.  
 6 (ECF No. 117-1.) In his declaration, Mr. Hall states that he has reviewed the two  
 7 documents in dispute: U.S. Customs and Border Protection Use of Force Review Report  
 8 (“Use of Force Review Report”) (Deft-1164-1183) and (2) Recommendations of the CBP  
 9 Use of Force Incident Review Committee, Recommendations of the Police Executive  
 10 Research Forum (PERF)(“Recommendations Report”) (Deft 1184-1226). (*Id.* at ¶2.)

11 According to Mr. Hall, both documents were prepared in response to former U.S.  
 12 Customs and Border Patrol (“CBP”) Deputy Commissioner David V. Aguilar’s 2012  
 13 directive that CBP conduct an “internal and external review of its policies, equipment,  
 14 tactics, training and operational posture with respect to the use of force.” (*Id.* at ¶ 3.)  
 15 Specifically, the Recommendations Report was prepared as part of the internal review  
 16 process, and reflects the responses and deliberations of CBP’s operational entities  
 17 regarding their agreement or disagreement with the recommendations made by PERF.  
 18 (*Id.* at ¶ 4.)

19 The Use of Force Review Report was prepared by the Review Committee in  
 20 February 2013. (*Id.* at ¶ 5.) This report contains a series of recommendations regarding  
 21 CBP’s use of force policy, training, equipment, tactics and operational posture. (*Id.*) The  
 22 report is the product, in part, of CBP’s internal deliberations and debate concerning use of  
 23 force issues and PERF’s use of force recommendations. (*Id.*)

### 24 **III. RELEVANT LAW**

25 The deliberative process privilege “protects materials created by administrative  
 26 agencies during the decision-making process.” *Nat’l Wildlife Fed’n v. United States*  
 27 *Forest Serv.*, 861 F.2d 1114, 1116 (9th Cir. 1988). The privilege applies to significant  
 28 policy decisions (*Chao v. Mazzola*, 2006 WL 2319721 \*3 (N.D. Cal. Aug. 10, 2006) and

1 is meant to promote the quality of those decisions by “protecting from disclosure internal  
 2 discussions which, if disclosed, would discourage the free-flow of ideas and ‘frank  
 3 discussion of legal or policy matters.’” *Bernat v. City of California City*, 2010 WL  
 4 4008361 \*4 (E.D. Cal. Oct. 12, 2010) citing *NLRB v. Sears Roebuck & Co.*, 421 U.S.  
 5 132, 150, 95 S.Ct. 1504, 44 L.Ed.2d 29 (1975).

6 In order to be protected by the deliberative process privilege, a document must be  
 7 both predecisional and deliberative. *Hongsermeier v. C.I.R.*, 621 F.3d 890, 904 (9th Cir.  
 8 2010). A predecisional document is one “prepared in order to assist an agency  
 9 decisionmaker in arriving at his decision” and may include “recommendations, draft  
 10 documents, proposals, suggestions, and other subjective documents which reflect the  
 11 personal opinions of the writer rather than the policy of the agency.” *Assembly of*  
 12 *California v. United States Dep’t of Commerce*, 968 F.2d 916, 920 (9th Cir. 1992). A  
 13 predecisional document is a part of the “deliberative process” if “disclosure of [the]  
 14 materials would expose an agency’s decisionmaking process in such a way as to  
 15 discourage candid discussion within the agency and thereby undermine the agency’s  
 16 ability to perform its functions.” *Id.* (internal citations omitted)

17 The party asserting the deliberative process privilege has the burden of establishing  
 18 that it protects the material at issue. *North Pacifica, LLC v. City of Pacifica*, 274  
 19 F.Supp.2d 1118, 1121 (N.D. Cal. 2002). This requires, “(1) a formal claim of privilege  
 20 by the head of the department possessing control over the requested information; (2) an  
 21 assertion of the privilege based on actual personal consideration by that official; and (3) a  
 22 detailed specification of the information for which the privilege is claimed, along with an  
 23 explanation of why it properly falls within the scope of the privilege.” *Coleman v.*  
 24 *Schwarzenegger*, 2008 WL 2237046 \*4 (E.D. Cal. May 29, 2008) (quoting *Landry v.*  
 25 *F.D.I.C.*, 204 F.3d 1125, 1135 (D.C. Cir. 2000)).

26 Once this showing is made, the court conducts a balancing inquiry regarding  
 27 whether the litigant’s need for the “materials and the need for accurate fact-finding  
 28 override the government’s interest in non-disclosure.” *F.T.C.*, 742 F.2d at 1161. In

1 balancing the need for disclosure against the need for confidentiality, the Ninth Circuit  
2 has considered the following factors: “(1) the relevance of the evidence; (2) the  
3 availability of other evidence; (3) the government’s role in the litigation; and (4) the  
4 extent to which disclosure would hinder frank and independent discussion regarding  
5 contemplated policies and decisions.” *Id.* Other factors courts may consider include:  
6 “(5) the interest of the litigant, and ultimately society, in accurate judicial fact finding, (6)  
7 the seriousness of the litigation and the issues involved, (7) the presence of issues  
8 concerning alleged governmental misconduct, and (8) the federal interest in the  
9 enforcement of federal law.” *North Pacifica, LLC*, 274 F.Supp.2d at 1122 (citing *U.S. v.*  
10 *Irvin*, 127 F.R.D. 169, 173 (C.D. Cal. 1989)). The deliberative process privilege should  
11 be “strictly confined within the narrowest possible limits consistent with the logic of its  
12 principles.” *North Pacifica, LLC*, 274 F.Supp.2d at 1122.

13 **IV. ANALYSIS**

14 **a. Timeliness of Defendants’ Declaration**

15 Plaintiffs argue that Defendants waived the ability to assert the official information  
16 privilege because they did not provide Plaintiffs with a declaration from an agency  
17 official when they provided their privilege log, and thus, did not “comply with the  
18 procedures outlined in *Hampton*.” (ECF No. 113 at 4.) In a prior order, this Court  
19 declined to interpret *Hampton* as standing “for the proposition of automatic waiver of  
20 privilege if a declaration is not provided to the receiving party upon production of the  
21 privilege log.” (ECF No. 127 at 6.)

22 Plaintiffs later attempt to apply this argument of waiver to the deliberative process  
23 privilege—“Because Fisher has not validly asserted either the official information or  
24 deliberative process privilege in response to Plaintiffs’ RFPs within the time prescribed  
25 by Rule 34, the Court should deem these privileges waived[.]” (ECF No. 113 at 5.)  
26 Plaintiffs’ cite no authority for the proposition that the deliberative process privilege is  
27 waived if a declaration is not provided with the privilege log. Moreover, as with the  
28 official information privilege, the Court likewise declines to adopt such a rigid guideline

1 for the deliberative process privilege. *Hickman v. Taylor*, 329 U.S. 495, 507 (1947)  
 2 (noting that discovery rules are to be accorded a broad and liberal treatment).

3 Accordingly, Defendants failure to provide Plaintiffs with a declaration in support of the  
 4 official information privilege or deliberative process privilege at the time they provided  
 5 the privilege log did not result in an automatic waiver of either privilege.

6                   **b. Sufficiency of Defendants' Declaration in Support of Deliberative**  
 7                   **Process**

8 Defendants have the burden of establishing that their documents are protected by  
 9 the deliberative process privilege. *North Pacifica, LLC*, 274 F.Supp.2d at 1121. This  
 10 requires, “(1) a formal claim of privilege by the head of the department possessing  
 11 control over the requested information; (2) an assertion of the privilege based on actual  
 12 personal consideration by that official; and (3) a detailed specification of the information  
 13 for which the privilege is claimed, along with an explanation of why it properly falls  
 14 within the scope of the privilege.” *Coleman*, 2008 WL 2237046 at \*4 (quoting *Landry*,  
 15 204 F.3d at 1135).

16                   **i. A Formal Claim of Privilege by the Head of the Department**  
 17                   **Possessing Control Over the Requested Information**

18 In support of their assertion of privilege, Defendants provided a declaration from  
 19 Christopher J. Hall, the Assistant Commissioner, Office of Training and Development,  
 20 United States Customs and Border Protection. (ECF No. 117-1.) Mr. Hall’s title  
 21 indicates that he is not the head of the relevant agency—the Border Patrol. However, at  
 22 least one court has noted that, when interpreting the sufficiency of the declaration in  
 23 support of the deliberative process privilege, it would be “counterproductive to read  
 24 ‘head of the department’ in the narrowest possible way[.]” *Landry v. F.D.I.C.*, 204 F.3d  
 25 1125, 1135 (D.C. Cir. 2000) (citations omitted). Instead, the “procedural requirements  
 26 are designed to ensure that the privileges are presented in a deliberate, considered, and  
 27 reasonably specific manner.” *Id.* (declining to require that assertion by the head of the  
 28 overall department or agency is necessary to invoke the deliberative process privilege,

1 and citing cases supporting that conclusion). This helps to ensure that the privilege is  
2 invoked by an informed executive official of sufficient authority and responsibility to  
3 warrant the court relying on his or her judgment. *National Lawyers Guild v. Attorney*  
4 *General*, 96 F.R.D. 390, 396 (S.D.N.Y 1982).

5 According to Mr. Hall’s declaration, his responsibilities include oversight of  
6 CBP’s law enforcement training programs, leadership development, and CBP’s use of  
7 force policy. (ECF No. 117-1 ¶ 1.) Given the scope of Mr. Hall’s responsibilities, this  
8 Court finds that he has sufficient authority and knowledge to assure the court that the  
9 privilege is being presented thoughtfully and specifically.

10 **ii. Based on Actual Personal Consideration by that Official**

11 Mr. Hall’s declaration states that he has “reviewed and [is] familiar with the  
12 following two documents: (1) U.S. Customs and Border Protection Use of Force Review  
13 Report (“Use of Force Review Report”) (marked as Deft-1164 through Deft-1183); and  
14 (2) Recommendations of the CBP Use of Force Incident Review Committee,  
15 Recommendations of the Police Executive Research Forum (PERF) (“Recommendations  
16 Report”) (marked as DEFT-1184 through Deft-1226). Because Mr. Hall declares that he  
17 has personally reviewed the documents in dispute, the Court is satisfied that his  
18 declaration is based on his personal consideration of those documents.

19 **iii. Detailed Specification of the Privilege and What Information is  
20 Protected by the Privilege**

21 In order to meet their burden in asserting the deliberative process privilege,  
22 Defendants’ declaration must contain a detailed specification of the privilege claimed,  
23 and the information purportedly protected. *Coleman*, 2008 WL 2237046 at \*4 (quoting  
24 *Landry*, 204 F.3d at 1135). Mr. Hall’s declaration explains that the Use of Force Review  
25 Report “contains a series of recommendations from a junior-level working group  
26 concerning CBP’s use of force policy, training, equipment, tactics and operational  
27 posture.” (*Id.* at ¶ 5.) According to Mr. Hall, the Use of Force Review Report “was the  
28 product, in part, of CBP’s internal deliberations and debate concerning a multitude of use

1 of force issues and PERF’s use of force recommendations.” (*Id.*)

2 The Recommendations Report reflects the responses of CBP’s operational entities  
 3 to the recommendations made by PERF, and whether or not each agency agreed with the  
 4 recommendations. (*Id.* at ¶ 4.) According to Mr. Hall, the report reflects the agency’s  
 5 internal deliberations, debate and recommendations regarding CBP’s use of force policy  
 6 and the changes proposed by PERF. (*Id.*)

7 Both documents were “prepared for, and reflected, CBP’s internal debate and  
 8 deliberations concerning changes proposed to its use of force policy.” (*Id.* at ¶ 6.) As a  
 9 result, according to Mr. Hall, disclosure of these documents “would expose CBP’s  
 10 internal decision-making process which occurred when it deliberated over whether to  
 11 adopt the proposed recommendations of the PERF Report.” (*Id.*)

12 The Court finds that Mr. Hall’s declaration contains a detailed specification of the  
 13 information for which the privilege is claimed as he identifies the two documents by title,  
 14 content, and bates number. The Court also finds that Mr. Hall’s declaration sufficiently  
 15 explains why Defendants believe that these two documents properly fall within the scope  
 16 of the privilege. Mr. Hall describes how the documents were used to inform policy  
 17 decisions and that they reflect internal discussions and debate regarding proposed policy  
 18 changes.

19 Because Defendants’ declaration is sufficient to inform the analysis of deliberative  
 20 process, the Court proceeds to analyze the merits of Defendants’ claim of deliberative  
 21 process privilege for each document.

22 **c. U.S. Customs and Border Protection Use of Force Review Report**

23 The first document this Court will analyze is the U.S. Customs and Border  
 24 Protection Use of Force Review Report (“Use of Force Review Report”) (Deft-1164-  
 25 1183). The Use of Force Review Report was prepared in February of 2013, in response  
 26 to former CBP Deputy Commissioner David V. Aguilar’s directive in 2012 that CBP  
 27 conduct an internal and external review of its policies, equipment, tactics, training and  
 28 operational posture regarding use of force. (ECF No. 117-1 ¶¶ 3-5.) According to Mr.

1 Hall's declaration, this document "contains a series of recommendations from a junior-  
2 level working group concerning CBP's use of force policy, training, equipment, tactics,  
3 and operational posture." (*Id.* at ¶ 5.) The Use of Force Review Report "was prepared  
4 for, and reflected, CBP's internal debate and deliberations concerning changes proposed  
5 to its use of force policy." (*Id.* at ¶ 6.) According to Mr. Hall, disclosure of this  
6 document "would expose CBP's internal decision-making process which occurred when  
7 it deliberated over whether to adopt the proposed recommendations of the PERF Report."  
8 (*Id.*)

9 **i. Predecisional**

10 A predecisional document is one "prepared in order to assist an agency  
11 decisionmaker in arriving at his decision" and may include "recommendations, draft  
12 documents, proposals, suggestions, and other subjective documents which reflect the  
13 personal opinions of the writer rather than the policy of the agency." *Assembly of*  
14 *California*, 968 F.2d at 920. Moreover, "the agency must identify a specific decision to  
15 which the document is predecisional." *Id.* at 1094.

16 Mr. Hall's declaration asserts that the Use of Force Review Report is predecisional  
17 because it "was prepared for, and reflected, CBP's internal debate and deliberations  
18 concerning changes proposed to its use of force policy." (ECF No. 117-1 at ¶ 6.) The  
19 specific policy decision to which the document is predecisional, therefore, is the revised  
20 use of force policy within the CBP. Because this document reviews a series of  
21 recommendations from the Use of Force Incident Review Committee, those  
22 recommendations necessarily reflect the opinions of that committee, not the final policy  
23 of the agency. Accordingly, the Court finds that the Use of Force Review Report is  
24 predecisional.

25 **ii. Deliberative**

26 A predecisional document is part of the deliberative process if "the disclosure of  
27 [the] materials would expose an agency's decision-making process in such a way as to  
28 discourage candid discussion within the agency and thereby undermine the agency's

1 ability to perform its functions.” *Maricopa Audubon Soc. v. U.S. Forest Service*, 108  
 2 F.3d 1089, 1093 (9th Cir. 1997).

3 Plaintiffs question Defendants’ characterization of this document as deliberative.  
 4 (ECF No. 120 at 2.) According to Plaintiffs, because the document is a review, it must  
 5 have taken place after an event or series of events. (*Id.*) The Court disagrees with  
 6 Plaintiffs’ blanket contention. A review can certainly be part of the deliberative process,  
 7 and reflection is often required prior to making meaningful change. As Mr. Hall’s  
 8 declaration explains, the Use of Force Review Report “[was] prepared for, and reflected,  
 9 CBP’s internal debate and deliberations concerning changes proposed to its use of force  
 10 policy.” (ECF No. 117-1 at ¶ 6.) According to Defendants, disclosure of this document  
 11 “would expose CBP’s internal decision-making process which occurred when it  
 12 deliberated over whether to adopt the proposed recommendations of the PERF Report.”  
 13 (*Id.*) Because disclosure of the Use of Force Review Report would reveal internal agency  
 14 discussions, which could discourage candid debate within the CBP, the Court concludes  
 15 the Use of Force Review Report is deliberative.<sup>2</sup>

16 The Court has determined that the Use of Force Review Report is both  
 17 predecisional and deliberative. Therefore, the materials can only be disclosed if  
 18 Plaintiffs’ need for the materials and need for accurate fact-finding outweigh the  
 19 government’s interest in confidentiality. *F.T.C.*, 742 F.2d at 1161. In order to determine  
 20 whether Plaintiffs’ need for the materials and need for accurate fact-finding outweigh the  
 21 government’s interest in confidentiality, the Court will conduct a balancing analysis.

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23 <sup>2</sup> Plaintiffs cite *Soto v. City of Concord*, 162 F.R.D. 603, 612–13 (N.D. Cal. 1995) and *Pittman v. County*  
 24 *of San Diego*, 2010 WL 3733867, at \*3 (S.D. Cal. Sept. 17, 2010) for the proposition that disclosure of  
 25 documents “in civil rights cases against law enforcement agencies almost always outweighs any  
 26 governmental interest in keeping confidential its deliberative processes.” (ECF No. 113 at 5.) These  
 27 cases, however, involve decisions and deliberations within local police departments—not policy  
 28 discussions within a federal agency, as is the case here. The *Soto* Court makes such a distinction when it  
 says that “[t]he deliberative process privilege should be invoked only in the context of communications  
 designed to directly contribute to the formulation of important public policy.” *Soto*, 162 F.R.D. at 612.  
 The Court finds that any revisions to a use of force policy within the Border Patrol is an important  
 public policy, and *Soto* and *Pittman* are inapposite.

### iii. Balancing of Factors to Decide Whether Disclosure is Appropriate

As discussed above, the Ninth Circuit considers the following factors in balancing the need for disclosure against the need for confidentiality: “(1) the relevance of the evidence; (2) the availability of other evidence; (3) the government’s role in the litigation; and (4) the extent to which disclosure would hinder frank and independent discussion regarding contemplated policies and decisions[,]” (*F.T.C.*, 742 F.2d at 1161) “(5) the interest of the litigant, and ultimately society, in accurate judicial fact finding, (6) the seriousness of the litigation and the issues involved, (7) the presence of issues concerning alleged governmental misconduct, and (8) the federal interest in the enforcement of federal law.” *North Pacifica, LLC*, 274 F. Supp.2d at 1122 (citing *U.S. v. Irvin*, 127 F.R.D. at 173. Each factor will be discussed in turn.

## 1. Relevance

Plaintiffs' complaint makes allegations regarding the conduct of two border patrol agents, and the supervisory liability of Defendant Fisher while he was Chief of CBP. Defendant Fisher's supervisory liability hinges on his knowledge of, and responsibility for, a de facto "rocking policy" by which agents respond with deadly force to the throwing of rocks by Mexican nationals, regardless of whether other, non-lethal means are available to avert any such risk. (*See* ECF No. 61 at 1-2.) Defendants argue that the Use of Force Review Report has "little relevance to the claims against [Defendant] Fisher because [it] go[es] to the deliberations about CBP's use of force policy – not the actual, final policy." (ECF No. 117 at 5.)

Defendants' argument misses the mark. A document reviewing the use of force policy within the Border Patrol would necessarily help to prove or disprove the existence of the purported rocking policy Plaintiffs allege. Moreover, Plaintiffs must prove supervisory liability for the allegations regarding Defendant Fisher. In the Ninth Circuit, a supervisor faces liability under the Fourth Amendment only where "it would be clear to a reasonable [supervisor] that his conduct was unlawful in the situation he confronted." *Chavez v. United States*, 683 F.3d 1102, 1110 (9th Cir. 2012) citing *Saucier v. Katz*, 533

1 U.S. 194, 202, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001), overruled in part on other  
2 grounds by *Pearson v. Callahan*, 555 U.S. 223, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009).  
3 The content of the Use of Force Review Report, therefore, would also be relevant to  
4 show what knowledge Defendant Fisher had as a supervisor regarding incidents  
5 involving the use of deadly force in response to rock throwing, and the extent to which he  
6 was responsible for such a policy. Accordingly, the Court concludes this document is  
7 relevant.

## 2. Availability of Comparable Evidence from Other Sources

9 Plaintiffs' complaint distinguishes between two use of force policies: the policy in  
10 place in 2011 when the events giving rise to this action took place, and a revised policy  
11 implemented in May of 2014. (See ECF No. 66 at ¶¶ 63 (regarding original policy) and  
12 111 (regarding revised policy).) Defendants argue that the *final* policy regarding use of  
13 force is comparable evidence to the Use of Force Review Report, and has already been  
14 produced in discovery. (ECF No. 117 at 5.) However, both policies are of limited  
15 importance if Plaintiffs cannot connect the dots as to why certain decisions were made,  
16 why certain provisions were added and others omitted. The final policy is not, by this  
17 Court's estimation, comparable evidence to the internal review of the original policy.  
18 Without more, Plaintiffs are left to conjecture regarding changes to the new policy and  
19 what knowledge Defendant Fisher had prior to authorizing such changes. This factor  
20 weighs heavily in favor of disclosure. *See North Pacifica*, 274 F.Supp.2d at 1124 (noting  
21 that this factor is "perhaps the most important factor in determining whether the  
22 deliberative-process privilege should be overcome").

### 3. Government's Role in the Litigation

24 In *United States v. Irvin*, the court found that the County’s role in the litigation and  
25 the possibility that discovery would inhibit county officials’ future communications  
26 militated against disclosure. 127 F.R.D. 169, 174 (C.D. Cal. 1989). However, in  
27 *Newport Pacific, Inc. v. County of San Diego*, the court held that, given the nature and the  
28 seriousness of the allegations involved in the suit, it would “not subscribe to the theory

1 that the government's role as a party to the litigation mitigates in favor of nondisclosure.”  
 2 *Newport Pac. Inc. v. Cty. of San Diego*, 200 F.R.D. 628, 640 (S.D. Cal. 2001). Instead, it  
 3 was the “very nature of the allegations and the role of the government in the litigation  
 4 itself that tip[ped] the scales in favor of disclosure.” *Id.* at 640. Although the  
 5 government agencies are no longer parties in this case,<sup>3</sup> the Court finds that the nature of  
 6 Plaintiffs’ allegations regarding constitutional violations by the chief of the Border Patrol  
 7 and the resulting policies within the agency militate toward disclosure.

#### 8                   **4. Chilling of Agency Discussion**

9                   Defendants argue that protecting this document from disclosure “will serve the  
 10 purpose of promoting candor in agency deliberations while allowing scrutiny of the final  
 11 decision[.]” (ECF No. 117-6.) Defendants cite *National Wildlife Fed'n v. United States*  
 12 *Forest Serv.*, for the proposition that “[i]t would be impossible to have any frank  
 13 discussions of legal or policy matters in writing if all such writings were to be subject to  
 14 public scrutiny.” 861 F.2d 1114, 1117 (9th Cir. 1998). While the Court acknowledges  
 15 the principle set forth in *National Wildlife*, that case involves an exception to the  
 16 Freedom of Information Act (“FOIA”), 5 U.S.C. § 552(b)(5), for “predecisional  
 17 documents.” *National Wildlife Fed'n*, 861 F.2d at 1115. The FOIA exceptions were  
 18 intended to prevent the disclosure of certain types of information from the public  
 19 generally, not to create evidentiary privileges for civil discovery. *Kerr v. U.S. Dist. Court*  
 20 *for N. Dist. of California*, 511 F.2d 192, 197-98 (9th Cir. 1975) aff'd, 426 U.S. 394, 96 S.  
 21 Ct. 2119, 48 L. Ed. 2d 725 (1976)(citations omitted). Under FOIA, a document that is  
 22 predecisional and deliberative need not be disclosed. *National Wildlife Fed. 'n*, 861 F.2d  
 23 at 1117. In the context of civil discovery, however, the inquiry extends beyond those two  
 24 factors to balance the interests of both parties. *See e.g.*, *Newport Pacific Inc.*, 200 F.R.D.  
 25 at 636; *North Pacifica, LLC*, 274 F.Supp.2d at 1120-20. As a result, the *National*  
 26

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27  
 28                   <sup>3</sup> The Court, however, notes that the remaining defendants are represented by government counsel,  
 which adds support to the conclusion that this litigation implicates government interests.

*Wildlife Fed'n* case is not instructive to the current analysis.

Defendants also cite *Robinson v. County of San Joaquin*, for the general proposition that disclosure of agency discussions protects those discussions and allows for “candor in formulating policy.” (ECF No. 117 at 5-6 citing 2014 WL 1922827, at \* (E.D. Cal. May 14, 2014).) But Defendants fail to articulate how disclosure of *this* document will chill agency discussion within the CBP.

In *Sanchez v. Johnson*, the court faced similar contentions regarding the chilling effect disclosure of documents would have on behind-the-scenes discussions. 2001 WL 1870308 \*1 (N.D. Cal. 2001). There, the court held that disclosure of certain documents “intrude[d] minimally, and without prejudice, into agency deliberations.” *Id.* at \*4 n. 7. Similarly, *Price v. County of San Diego* held that the documents at issue should be produced and noted “the infringement upon the frank and independent discussions regarding contemplated policies and decisions by the County . . . can be alleviated through the use of a strict protective order.” 165 F.R.D. 614, 620 (S.D. Cal. 1996).

This Court finds both *Sanchez* and *Price* persuasive. Defendants' concerns regarding the frankness of agency discussion does not weigh strongly against disclosure and can be mitigated through the use of the protective order.<sup>4</sup>

## 5. Interest in Judicial Fact-finding and Seriousness of Litigation Issues

The desirability of accurate fact-finding weighs in favor of disclosure. Although both Plaintiffs and Defendants fail to address this factor in their briefs, the Court notes that the allegations in Plaintiffs' complaint involve potentially serious constitutional violations by agents Nelson and Diaz as individuals and Defendant Fisher in his capacity as a supervisor. The seriousness of the issues involved magnifies the interest of the court and society in accurate fact-finding. *See Newport Pacific Inc.*, 200 F.R.D. at 640 (finding

<sup>4</sup> The parties were ordered to submit a protective order to this Court no later than February 10, 2016. (ECF No. 127 at 9.)

1 where the case alleged violations of federal constitutional magnitude the tendency is to  
 2 allow discovery). These factors support disclosure of the document.

3 **6. Issues of Alleged Government Misconduct and Federal  
 4 Interest In Enforcement of Federal Law**

5 Plaintiffs' complaint alleges Defendant Fisher's knowledge and approval of a  
 6 purportedly unlawful rocking policy used by CBP agents generally, and Defendants Diaz  
 7 and Nelson specifically, along the U.S./Mexico border. (ECF No. 66 at ¶ 66.) Such  
 8 allegations necessarily involve misconduct by government agents and officials, as well as  
 9 the federal interest in the enforcement of constitutional law. These factors support  
 10 disclosure.

11 **7. Conclusion of Factor Analysis**

12 After balancing the above factors, this Court finds that Plaintiffs' need for  
 13 disclosure outweighs Defendants' interest in the confidentiality of the Use of Force  
 14 Review Report. The document is relevant to Plaintiffs' claims in this case and not  
 15 otherwise available to Plaintiffs. Defendants' assertion of deliberative process regarding  
 16 the Use of Force Review Report is **OVERRULED**. Plaintiffs' Motion to Compel  
 17 production of the Use of Force Review Report is **GRANTED**. Defendants are ordered to  
 18 produce this document subject to the protective order previously required in this case.<sup>5</sup>  
 19 Defendants must produce the Use of Force Review Report **within seven (7) calendar**  
 20 **days** of when the Court signs the protective order.

21 **d. Recommendations Report**

22 The second document this Court will analyze is the Recommendations of the CBP  
 23 Use of Force Incident Review Committee, Recommendations of the Police Executive  
 24 Research Forum (PERF) ("Recommendations Report") (marked as Deft -1184 through  
 25 Deft-1226). Like the Use of Force Review Report, this document was also prepared in  
 26

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28 <sup>5</sup> The parties were ordered to submit a protective order to this Court no later than February 10, 2016.  
 (ECF No. 127 at 9.)

1 response to former CBP Deputy Commissioner David V. Aguilar's directive in 2012 that  
2 CBP conduct an internal and external review of its policies, equipment, tactics, training  
3 and operational posture regarding use of force. (ECF No. 117-1 ¶ 5.) The internal  
4 review was performed by staff officers from the Office of Air and Marine, Office of  
5 Border Patrol, Office of Training and Development, Office of Chief Counsel, and  
6 Internal Affairs. (*Id.* at ¶ 3.)

7 The Recommendations Report was prepared as part of the internal use of force  
8 review process and reflects the responses of CBP's operational entities to PERF's  
9 recommendations. (*Id.* at ¶ 4.) CBP considered this document to be "Law Enforcement  
10 Sensitive," and deliberative when it was prepared in 2013. (*Id.*) This document "reflects  
11 the agency's internal deliberations, debate and recommendations with respect to CBP's  
12 use of force policy and the changes proposed by PERF." (*Id.*) According to Mr. Hall,  
13 this report was "used to frame the debate over the course of 2013 and 2014 to inform  
14 changes to the CBP Use of Force program." (*Id.*) Defendants state that disclosure of this  
15 document "would expose CBP's internal decision-making process which occurred when  
16 it deliberated over whether to adopt the proposed recommendations of the PERF Report."  
17 (*Id.*)

18 **i. Predecisional**

19 As discussed in more detail above in section IV(c)(i), a "predecisional" document  
20 is one "prepared in order to assist an agency decisionmaker in arriving at his decision"  
21 and may include "recommendations, draft documents, proposals, suggestions, and other  
22 subjective documents which reflect the personal opinions of the writer rather than the  
23 policy of the agency." *Assembly of California*, 968 F.2d at 920. Mr. Hall's declaration  
24 indicates that the Recommendations Report is predecisional because it "reflects the  
25 agency's internal deliberations, debate and recommendations with respect to CBP's use  
26 of force policy and the changes proposed by PERF." (ECF No. 117-1 at ¶ 4.)  
27 Specifically, the Recommendations Report contains feedback from each operational  
28 entity regarding PERF's recommendations. These written entries reflect the opinions of

1 each operational entity, not the final policy of the agency. Because the  
 2 Recommendations Report was prepared to assist CBP in arriving at their decision to  
 3 revise the use of force policy, and includes recommendations from operational entities  
 4 within CBP, the Court finds that it is predecisional.

5 **ii. Deliberative**

6 A predecisional document is a part of the “deliberative process” if “disclosure of  
 7 [the] materials would expose an agency’s decisionmaking process in such a way as to  
 8 discourage candid discussion within the agency and thereby undermine the agency’s  
 9 ability to perform its functions.” *Assembly of California*, 968 F.2d at 920 (internal  
 10 citations omitted). According to Mr. Hall, disclosure of the Recommendations Report  
 11 “would expose CBP’s internal decision-making process which occurred when it  
 12 deliberated over whether to adopt the proposed recommendations of the PERF Report.”  
 13 (ECF No. 117-1 at ¶ 6.)

14 As described in more detail above, the Court disagrees with Plaintiffs’ blanket  
 15 contention that, because the document is a review, it must have taken place after an event  
 16 or series of events. The Court agrees that disclosure of this document would expose  
 17 CBP’s decisionmaking process and could discourage candid discussion within the  
 18 agency. Because the Recommendations Report includes the reactions from multiple  
 19 operational entities regarding the proposed changes in policy sought by each  
 20 recommendation from PERF, the Court concludes it is deliberative.

21 The Court has determined that the Recommendations Report is both predecisional  
 22 and deliberative. However, the materials can only be disclosed if Plaintiffs’ need for the  
 23 materials and need for accurate fact-finding outweigh the government’s interest in  
 24 confidentiality. *F.T.C.*, 742 F.2d at 1161.

25 **iii. Balancing of Factors to Decide Whether Disclosure is Appropriate**

26 In balancing the need for disclosure against the need for confidentiality, this Court  
 27 applies the same factors described above in section IV(c)(iii).

28 ///

## 1. Relevance

The Recommendations Report involves the same subject matter as the Use of Force Review Report. As was the case in section IV(c)(iii)(1), a document reflecting the opinions of multiple operational agencies regarding CBP's use of force policy necessarily speaks to the existence of a rocking policy, as well as Defendant Fisher's knowledge of this policy in his supervisory role. The Court concludes this document is relevant.

## 2. Availability of Comparable Evidence from Other Sources

Defendants argue that the final policy regarding use of force is comparable evidence to the Recommendations Report, and the final policy has already been produced in discovery. (ECF No. 117 at 5.) As the Court explained above in section IV(c)(iii)(2), the revised policy does not constitute comparable evidence. This factor weighs heavily in favor of disclosing the Recommendations Report.

### **3. Government's Role in the Litigation**

As described above in section IV(c)(iii)(3), the nature of Plaintiffs' allegations regarding constitutional violations by the chief of the Border Patrol and the resulting policies within the agency militate toward disclosure.

#### **4. Chilling of Agency Discussion**

As above in section IV(c)(iii)(4), Defendants' concerns regarding the frankness of agency discussion does not weigh strongly against disclosure and can be mitigated through the use of the protective order.

## 5. Interest in Judicial Fact-finding and Seriousness of Litigation Issues

The desirability of accurate fact-finding weighs in favor of disclosure. Plaintiffs' allegations of constitutional violations by Defendants magnifies the interest of the court and society in accurate fact-finding and supports disclosure of the document.

## **6. Issues of Alleged Government Misconduct and Federal Interest In Enforcement of Federal Law**

As discussed above in section IV(c)(iii)(6), Plaintiffs' allegations regarding

1 Defendant Fisher's knowledge and approval of a purportedly unlawful rocking policy  
2 used by the CBP agents along the U.S./Mexico border implicates alleged government  
3 misconduct and the federal interest in the enforcement of constitutional law. These  
4 factors support disclosure.

5 **7. Conclusion of Factor Analysis**

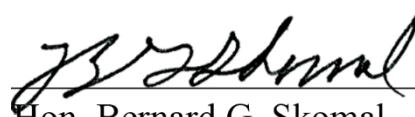
6 After balancing the above factors, this Court finds that Plaintiffs' need for  
7 disclosure outweighs the government's interest in the confidentiality of the  
8 Recommendations Report. The document is relevant to Plaintiffs' claims in this case and  
9 not otherwise available to Plaintiffs. Defendants' assertion of deliberative process  
10 regarding the Recommendations Report is **OVERRULED**. Plaintiffs' Motion to Compel  
11 production of the Recommendations Report is **GRANTED**. Defendants are ordered to  
12 produce this document subject to the protective order previously required in this case.<sup>6</sup>  
13 Defendants must produce the Recommendations Report **within seven (7) calendar days**  
14 of when the Court signs the protective order.

15 **V. CONCLUSION**

16 For the above mentioned reasons, Plaintiffs' Motion to Compel is **GRANTED**.  
17 The parties were ordered to submit a protective order to this Court no later than February  
18 10, 2016. (ECF No. 127 at 9.) Defendants must produce the Use of Force Review  
19 Report and Recommendations Report **within seven (7) calendar days** of when the Court  
20 signs the protective order.

21  
22 IT IS SO ORDERED.

23 Dated: February 9, 2016  
24

  
25 Hon. Bernard G. Skomal  
26 United States Magistrate Judge

27  
28 <sup>6</sup> The parties were ordered to submit a protective order to this Court no later than February 10, 2016.  
(ECF No. 127 at 9.)